No. 14,262

United States Court of Appeals

For the Ninth Circuit

PERCY P. DAVIS,

Appellant,

vs.

GUY F. ATKINSON COMPANY, a Corporation, and J. A. JONES CONSTRUCTION COMPANY, a Corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an appeal to the United States Court of Appeals for the Ninth Circuit, from a summary judgment in favor of appellees made and entered by the United States District Court for the Northern District of California, Southern Division.

JURISDICTION.

This cause was commenced by the filing of a complaint on behalf of appellant to recover damages from the appellees for the breach of a contract of employment (TR 3). Upon the entry of an order of the District Court granting appellees' motion for sum-

mary judgment (TR 32), appellant asked for leave to file an amended complaint, which leave was granted by the District Court. By his amended complaint (TR 33), appellant seeks to recover damages for fraud or misrepresentations of appellees in inducing appellant to enter appellees' employment and in procuring the execution of said contract of employment.

Appellees moved for summary judgment on the principal ground that there was no triable issue of fact in that it affirmatively appeared from the records and files in the action that appellant had failed to state a claim upon which relief could be granted (TR 51). The motion was granted (TR 52) and summary judgment was thereupon entered in favor of appellees (TR 53). Appellant thereupon filed notice of appeal from that judgment (TR 54).

The District Court had jurisdiction of the action by virtue of the provisions of Section 1332 of Title 28 U.S.C.A. (formerly 28 U.S.C.A., Section 41) (TR 3, 9).

The United States Court of Appeals for the Ninth Circuit has jurisdiction of said appeal by virtue of the provisions of Sections 41, 1291, 1294, and 2107 of Title 28, U.S.C.A., notice of appeal (TR 54) having been filed within thirty days from the entry of the summary judgment.

This Court has jurisdiction over this appeal from the judgment of the District Court granting the summary judgment.

Federal Rules of Civil Procedure, Rule 56(b);

Bee Machine Co. v. Freeman, 131 Fed. (2d) 190, affirmed 319 U.S. 448, 63 S.Ct. 1146, 87 L. Ed. 1509, rehearing denied 320 U.S. 809, 64 S.Ct. 27, 88 L.Ed. 489.

STATEMENT OF THE CASE.

Appellees had been awarded a contract with the War Department of the United States for the performance of certain construction work on the Island of Okinawa and at other locations in the area under the jurisdiction of the Western Ocean Division of the United States Engineer Corps. They employed a large number of workers on said Island of Okinawa. The contract of employment in general use for work on said Island provided, so far as necessary to note here, that board, lodging, medical services, and *dental care of an emergency nature only,* would be furnished to appellees' employees at the site of the work to the extent authorized by the Contracting Officer, and at a charge approved by him, which charge would not exceed the sum of $1.50 per day.

Prior to his employment by appellees appellant had been a dentist practicing his profession and maintaining an office in New York City, and was a member of and employed by the Board of Health of that City (TR 33).

During the months of November and December, 1947, appellees advertised in several newspapers in New York City offering employment on the Island

of Okinawa. The published advertisement notified all applicants for such employment to present themselves to George A. Gardner, personnel manager of appellees, at New York City. The advertisement further provided for a one year contract with transportation furnished (TR 47), and also that limited dental care would be furnished without charge (TR 34, 48).

Appellant and his wife conferred with said George A. Gardner with respect to employment as dentist for himself and dental assistant for his wife. Appellant stated to Mr. Gardner that he and his wife could not accept the positions purely on a salary basis unless he would be allowed to engage in private practice (TR 48). Having been advised by Mr. Gardner that no private fees could be permitted because of government regulations which forbade the use of government property for private purposes, appellant suggested that he be allowed to use certain equipment of his own for such purpose. Mr. Gardner stated that he could conceive of no objection to such arrangement and that further details would be worked out with the office in Sausalito, California (TR 48). After arriving in Sausalito, California, appellant and his wife conferred with Mr. Robert E. Doyle, personnel manager of appellees at that place. Appellant likewise told Mr. Doyle that he and his wife could not accept the employment purely on a salary basis unless he would be allowed to engage in private practice; appellant informed Mr. Doyle of the conditions under which he and his wife had previously worked on other contract positions, and that on such previous positions

they had been permitted to engage in private practice and to receive private fees for particular services. Appellant also told Mr. Doyle that he would use his own equipment in such private practice (TR 48, 49). Mr. Doyle stated to appellant that the employees of appellees were entitled to dental work of an emergency nature only, and that if they wanted other dental work done they would have to pay for such work. He told appellant that any work that he might do for any employee, other than work of an emergency nature, would be between the patient and appellant, and that the patient would have to pay for such work (TR 49). Appellant also told Mr. Doyle that he had the necessary dental equipment and supplies ready for complete dental service and he requested permission for an extra weight allowance in shipping the equipment to Okinawa. Mr. Doyle gave his approval for the extra weight shipment (TR 49).

Appellant asked Mr. Doyle for a definite contract setting forth the provisions with regard to private work, but appellant was told that it would not be possible to sign such special contract because only a general contract was available for all employees. Mr. Doyle stressed the fact that the contract with the employees called only for emergency dental work and that any other work would be between the patient and appellant (TR 49, 50).

Thereafter and on December 5, 1947, appellant, relying upon the representations so made by appellees, signed and executed a written contract (TR

16, 17), purporting to hire and employ appellant as a dentist at the site of the construction work on said Island of Okinawa (TR 36). Appellant thereupon shipped to said Island a complete operative, prosthetic, crown and bridge kits and engine, all of which equipment had no relation to emergency dental work. Appellees authorized a special weight allowance in shipping said equipment. Appellant and his wife went to Okinawa where they immediately entered the employ of appellees (TR 36, 37).

After arriving on said Island of Okinawa appellant was notified by appellees that he could not engage in the private practice of dentistry, and he was prevented by appellees from engaging in such private practice. Appellant was also notified that he did not have a one year contract but that his employment was terminable at any time at the will of appellees (TR 37, 38). Appellant was thereupon discharged and his employmeent terminated (TR 38).

Appellant and his wife returned to the United States at their own cost, and appellant was compelled to and did pay for his subsistence until his return to New York City, and his expenses of transportation and of the transportation of his dental equipment to New York City (TR 38, 39).

Appellant by his amended complaint claims damages in the total sum of $43,850.00 (TR 39, 40).

Following the filing of appellant's amended complaint (TR 33) appellees filed their answer thereto (TR 40). Appellees then filed and served request for

admissions and also propounded interrogatories to be answered by appellant (TR 45). Appellant filed his affidavit admitting certain matters (TR 50), and filed his answers to the interrogatories propounded to him (TR 46).

Appellees then moved for summary judgment (TR 51), which motion was granted by the District Court (TR 52) and summary judgment was thereupon entered in favor of appellees and against appellant that appellant take nothing by his action, that the same be dismissed and that judgment be entered for appellees with costs (TR 53). From this judgment this appeal is taken (TR 54).

There is only one issue involved on this appeal: Was appellant induced to enter into the employment of appellees by reason of the representations of appellees that the contract would continue for one year, that the services which he was to perform under the contract of employment would be limited to dental services of an emergency nature only, and that he could otherwise engage in the private practice of dentistry. Appellant will divide that issue into two parts:

1. The representations made by appellees constituted actionable fraud;

2. Appellant was not precluded from relying on the representations of appellees by reason of any contract provisions, where appellant was induced to enter into the contract by reason of such representations.

SPECIFICATION OF ERRORS.

1. The District Court erred in finding that appellant had no cause of action for fraud.

2. The District court erred in finding that the written contract executed by the parties was not induced by any fraud or misrepresentation of any kind of appellees.

3. The District Court erred in allowing the motion of appellees for summary judgment.

SUMMARY OF ARGUMENT.

Appellant contends that a summary judgment should not be entered unless the pleadings, depositions and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

We will show that the allegations of the amended complaint, the admissions and depositions on file positively show that appellant was induced to enter into the employment of appellees and to execute the written contract of employment through the false representations of appellees; that appellees' liability for fraud could not be restricted by any provisions in the written contract; and that appellees were bound by the acts of their officers and agents.

ARGUMENT.

I.

SUMMARY JUDGMENT SHOULD NOT BE ENTERED UNLESS THE PLEADINGS, DEPOSITIONS AND ADMISSIONS SHOW THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT.

In passing upon a motion for summary judgment it is not the function of the Court to decide issues of fact but only to determine whether there are such issues to be tried.

Lane v. Greyhound Corporation, 13 F.R.D. 178.

The decisions are unanimous in holding that, in considering a motion for summary judgment, the Court should take the view most favorable to the party against whom the motion is directed, giving the party the benefit of all favorable inferences that may reasonably be drawn from the evidence, and resolving all doubts as to the existence of a genuine issue against the moving party.

Toebelman v. Missouri-Kansas Pipe Line Co., 130 Fed. (2d) 1016;

Ramsouer v. Midland Valley Railroad Co., 135 Fed. (2d) 101;

Sarnoff v. Ciaglia, 165 Fed. (2d) 167;

Lane v. Greyhound Corporation, 13 F.R.D. 178.

> "A summary judgment is to be entered in a case, if, but only if, the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule

> 56(c) Federal Rules of Civil Procedure. A summary judgment upon motion therefor by a defendant in an action should never be entered except where the defendant is entitled to its allowance beyond all doubt. To warrant its entry the facts conceded by the plaintiff, or demonstrated beyond reasonable question to exist, should show the right of the defendant to a judgment with such clarity as to leave no room for controversy, and they should show affirmatively that the plaintiff would not be entitled to recover under any discernible circumstances."
>
> *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 Fed. (2d) 213.

It is the position of appellant that there was a genuine issue of fact which should have been tried by the Court or a jury, and therefore the summary judgment was improper.

II.

THE ALLEGATIONS OF THE AMENDED COMPLAINT, ADMISSIONS AND DEPOSITIONS SHOW THAT APPELLANT WAS INDUCED TO ENTER INTO THE EMPLOYMENT OF APPELLEES AND TO EXECUTE THE CONTRACT OF EMPLOYMENT THROUGH THE FALSE REPRESENTATIONS OF APPELLEES.

The amended complaint and appellant's answers to the interrogatories propounded to him show that appellant and his wife, in response to advertisements appearing in certain New York newspapers, conferred with appellees' New York representative as to

possible employment of appellant as dentist and of his wife as his dental assistant (TR 33, 34, 48). Appellant particularly stated at that time that he and his wife could not accept the positions on a salary basis only unless he would be allowed to engage in the private practice of dentistry. After being informed that such employment could be arranged, appellant and his wife went to Sausalito, California, where they conferred with appellees' personnel manager (TR 35, 36, 48). During said conference appellant again stated that he and his wife could not accept the employment purely on a salary basis unless appellant would be allowed to engage in private practice, in which private practice he would use his own equipment. Appellees' personnel representative then stated to appellant that all employees were entitled to dental work of an emergency nature only, and as stated by appellant in his answers to the interrogatories:

> "I asked Mr. Doyle for a definite contract setting forth the provisions with regard to private work, but he told me that it would not be possible to sign such special contract because only a general contract was available for all employees. He stressed the fact before Mr. Fassett and Mr. Keenan that the contract with the employees called only for emergency dental work and that any work that we might do, other than work of an emergency nature, would be between the patient and myself." (TR 49, 50.)

As the result of their conference the parties executed the written contract of December 5, 1947 (TR

16, 17) which contract provided in paragraph 7 thereof as follows:

> "Board, lodging, medical services, and *dental care of an emergency nature only,* will be furnished by the Contractor at the site of the work to the extent authorized by the Contracting Officer, and at a charge approved by him, which charge shall not exceed the sum of One Dollar and Fifty Cents ($1.50) per day." (Italics ours) (TR 16, 17).

In complete reliance upon the representations and statements of appellees that appellant could engage in private practice and that his employment would continue for not less than one year, appellant shipped his equipment to Okinawa, for which shipment appellees had authorized a special weight allowance (TR 36).

At no time during appellant's interviews in New York or California was he or his wife informed that the contract was one that could be terminated at any time at the will of appellees, or that he could not engage in the private practice of dentistry, or that there were any rules or regulations of the United States Government prohibiting such private practice, other than appellant could not use government equipment in such private practice. Appellant and his wife were led to believe otherwise.

There can be no doubt that the statements or representations made by appellees under the circumstances of this case constituted actionable fraud. It is the only

inference that reasonable minds can make from the facts shown by the pleadings and the depositions.

Appellees, with full knowledge that appellant would not consent to the employment unless he could engage in private practice for at least one year, nevertheless positively and intentionally represented to appellant that he could so engage, and thereby induced him to accept the employment and to sign the written contract.

All the necessary elements of fraud have been established in this case.

Actual fraud consists in the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; or the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; or the suppression of that which is true, by one having knowledge or belief of the fact.

Section 1572, Civil Code of California.

Constructive fraud consists in any breach of duty which, without an actual fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice.

Section 1573, Civil Code of California.

> "It is not necessary, to constitute a fraud, that a man who makes a false statement should know precisely that it is false. It is enough if it be false, and if he made it recklessly, and without an honest belief in its truth, or without reasonable ground for believing it to be true, and be

made deliberately and in such a way as to give the person to whom it is made reasonable ground for supposing that it was meant to be acted upon and has been acted upon by him accordingly."

Cooper v. Schlesinger, 111 U. S. 148, 4 S.Ct. 360, 28 L. Ed. 382.

Thus when appellees, through their personnel manager, stated to appellant that he could engage in the private practice of dentistry, knowing full well that such statement was not true, they were guilty of actual fraud. The law in such case supplies the fraudulent intent to deceive. And even if appellees had not fraudulently intended to deceive appellant, they were guilty of constructive fraud in negligently and carelessly making such statement or representation.

Hayter v. Fulmor, 92 Cal.App. (2d) 392, 206 Pac. (2d) 1101.

That appellees knew that the representation was false is shown by the deceptive answers given to appellant's several inquiries regarding his right to engage in private practice, and other untrue or misleading statements of appellees during the course of the interviews with appellant. The conduct of appellees clearly showed an intent to deceive appellant. They knew that appellant did not want to enter their employment unless he could engage in private practice during the full term of his employment. Except for the representation made by appellees that he could so engage appellant would not have entered

appellees' employment or executed the written contract.

> "But a representation need not be a direct lie in order to constitute remediable fraud; the false representation may consist in a deceptive answer, or any other indirect but misleading language. No hard and fast rule can be laid down as to what constitutes a fraudulent representation in any given case, since this depends upon the peculiar circumstances and conditions involved."
>
> *Benner v. Hooper,* 112 Cal.App. 53, 296 Pac. 660.

When considered in connection with all the facts in the case, the sale of appellant's practice in New York City, his resignation from the Board of Health of that City, the sale of his automobile and furniture, the shipment of his dental equipment to Okinawa, there can be no doubt that the representations, made by appellees as claimed by appellant, were material as an inducement to enter appellees' employment and to execute the contract of employment, and that upon the facts alleged in the amended complaint and shown in the answers to the interrogatories appellant is entitled to have the issues submitted to the Court or a jury.

As to the promise of employment for the period of one year as shown by the published advertisements in the New York City papers, appellant was justified in relying upon such statement and representation without further independent investigation on his own.

> *MacDonald v. DeFremery,* 168 Cal. 189, 142 Pac. 73.

The rule that one accepting an instrument or signing a contract, without reading it or having it read, will not be heard to say that he was ignorant of its contents, does not apply, when an actual fraud has been committed and the signature obtained by misrepresentations.

Mardis v. Miller (C.C.A. 8) 241 Fed. 470;
Security-First National Bank v. Earp, 19 Cal. (2d) 774, 122 Pac. (2d) 900.

Fraudulent representations, by which a party is induced to enter into a contract to his damage, may be established by parol evidence, even though the written instrument purports to contain the entire agreement between the parties.

Hunt v. M. L. Field, Inc., 202 Cal. 701, 262 Pac. 730.

III.

APPELLEES' LIABILITY FOR FRAUD CANNOT BE RESTRICTED BY THE PROVISION OF THE WRITTEN CONTRACT THAT IT CONSTITUTES THE ENTIRE AGREEMENT AND THAT NO PROMISES OR UNDERSTANDINGS HAVE BEEN MADE OTHER THAN THOSE STATED THEREIN.

Section 22 of the contract between appellant and appellees provides:

"The employee certifies to the contractor that he has read the foregoing agreement and that he fully understands its terms and conditions, and further certifies that the foregoing terms and conditions constitute his entire agreement with the employer, and that no promises or understandings have been made other than those stated

above; and it is specifically agreed by the parties hereto that this agreement shall be subject to modification only by written instrument signed by both the contractor and the employee."

It is a fundamental principle of law that a party cannot contract against liability for his own fraud. Fraud which enters into the making of the contract cannot be excluded from the reach of the law by any formal provision inserted in the contract itself.

The provision contained in paragraph 22 of the contract did not preclude appellant from showing that the contract was procured through fraud.

Blackwell v. Thomason, 84 Cal.App. 784, 258 Pac. 724;

Mooney v. Cyriaks, 185 Cal. 70, 195 Pac. 192;

Whitting v. Squeglia, 70 Cal.App. 108, 233 Pac. 986.

There is no affidavit of appellees on file denying the authority of Robert E. Doyle to employ appellant or that Doyle was not acting within the scope of his authority in making the representations which induced appellant to enter into the contract of employment. We believe that it may fairly be inferred from the pleadings and depositions that Doyle was in complete charge of appellees' employment or personnel department, with authority to employ such help as appellees required under their contract with the War Department. There is, therefore, in this case no question of appellees' personnel representative violating his instructions or exceeding his authority. His authority was never denied.

It is clear that it was within Mr. Doyle's duties as manager of appellees' personnel department to discuss with all applicants for employment the terms and conditions of such employment. Appellees must therefore be held liable for the false representations made by their personnel manager to appellant. The rule is stated in the Restatement of the Law of Agency, Section 261, as follows:

> "A principal who puts an agent in a position that enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud."

In such case the liability of the principal is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.

Rutherford v. Rideout Bank, 11 Cal. (2d) 479, 80 Pac. (2d) 978.

The record supports the contention of appellant that Robert E. Doyle was the agent of appellees and acted within the scope of his authority in his transaction with appellant.

CONCLUSION.

It is submitted that the pleadings, depositions and admissions on file in this case show that there exists a genuine issue of fact, and therefore it was error for the District Court to grant appellees' motion for summary judgment, and the summary judgment against appellant should be reversed.

Dated, San Francisco, California,
June 7, 1954.

Respectfully submitted,
G. H. VAN HARVEY,
Attorney for Appellant.